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ABSTRACT

The duties of a therapist to a deceased client are not directly dealt with in codes of ethics. The issues came into focus following the publication of a biography of Anne Sexton, as it contained information from more than 80 hours of therapy that Ms. Sexton's psychologist released to the biographer. This paper considers the question of whether the release of these tapes was unethical. The consideration is made from many perspectives, including Freud's, which took the position that the decision to use a client's case history for presentation or publication was solely the duty of the therapist. Several case situations are presented and possible remedies on the part of the therapist are highlighted. (GCP)

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Searching for Mercy Street: Protecting Records after the Client's Death

by
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SEARCHING FOR MERCY STREET: PROTECTING RECORDS AFTER THE CLIENT'S DEATH

Gary R. Schoener*

Most of our symposium has dealt with the issue of the therapist's death or disability. The duties of a therapist to a deceased client are equally interesting, although not as directly dealt with in codes of ethics. The international code from the Geneva convention speaks of protecting the privacy of clients, dead or alive, but this is atypical.

These issues came into focus in 1992 after Diane Middlebrook's biography of ANNE SEXTON, America's first confessional poet, was published. There were many interchanges in the public media not to mention several debates at the Annual Convention of the American Psychiatric Association. At issue was the fact that psychologist & psychiatrist, Dr. Martin Orne, had released to professor Middlebrook his clinical records and more than 300 tapes of therapy sessions with Ms. Sexton. He also granted over 80 hours of interview and wrote the introduction to the book. More recently, as Dr. Nagy indicated in his presentation, social worker Susan Forward became the focus of attention after revealing information from her brief contact with Nicole Brown Simpson prior to the trial of O.J. Simpson. She was subsequently disciplined for this disclosure to the news media.

We lack the time to fully discuss these issues, partly because they interface with a number of realities:

(1) The concept of informed consent -- the client's role is decision-making is relatively new. It was not part of the Hippocratic tradition or most medical traditions which have followed. (None of the 72 writings in the Corpus Hippocratum mention consent, nor does the most famous writing, the "Oath." Freud believed, for example, that the decision whether to use a client's case history for presentation or publication was solely the duty of the physician. In fact, in his study of Dora he indicated that those who are unwilling to share such case materials are cowards.

(2) Just as the death or disability of the therapist is not usually foreseen, neither is the death of the current or former client. So, obtaining informed consent regarding the handling of records after death is not typical. Initial disclosure forms given to clients typically do not foresee such an eventuality, although as other speakers have indicated, professionals should have provisions for their duties to clients in the event of the therapist's death or disability.

(3) In most jurisdictions, the heirs inherit control of the patient's records. As such they can access them and can direct that others access them. In the Orne/Sexton case this took the form of Ms. Sexton's daughter releasing the records to a biographer. Psychologist Sam Knapp has sent me a directive from the Pennsylvania Board of Psychology which mandates that after the client's death the therapist release records only in response to a court order. It is not clear how this squares with other Pennsylvania statutes about records access.

(4) In most if not all jurisdictions, police and medical examiners investigating a death are granted records access to records reasonably needed to investigate the death of a client.

(5) Although the APA has at times published some guidelines, records retention is not bound by clear rules or standards, and some records are kept for very long periods of time. Records today are often needed in case there is a posthumous claim of substandard services, wrongful death, or related matters. In the case of a child, this would start running at the time of the child - client reaching the age of majority.

(6) Many journals, which have strict rules related to informed consent as part of research, do not have similar standards for case histories. Authors are simply asked to use ample disguise for clinical materials presented in articles. Authors are not required to submit evidence of client consent to disclosures, or client consent to the disguises utilized.

(7) In the psychotherapy professions there has been some tendency to treat the records of the famous differently, and one hears arguments about the "historic value" of such records. In fact, there is a considerable literature of popular works in which service providers have provided confidential information to biographers and historians.

Zelda Fitzgerald's hospitalizations at Phipps and Pratt are discussed in Nancy Millford's biography of her. After Secretary of Navy James Forrestal's suicide considerable confidential material was made available to writers. Sylvia Plath's problems are discussed in depth in ROUGH MAGIC. Scott Danielson's writings about John Cheever contain previously confidential material. And John Geddows work about Jackson Pollock -- PORTRAIT OF THE ARTIST -- contains much private information.

Was Freud right? Do we have some duty to preserve records and reveal the secrets of famous people? Is this historic information? Should this be used in "psychohistories"?

I will review several actual case situations and examine both issues and possible remedies.

(1) The police contact our center for information on a client who has allegedly disappeared, and is feared dead or at risk of harm. We are contacted because it is known that the man was seeing a therapist at our center. We are asked for information. There is no release possible since the client has disappeared.

OUR ACTION: We first verified that the police officer was who he said he was, and conducting such a search. We then asked what would assist in the search....and also what they already knew. We verified that the address that we had was the one they had. We provided the date of the last appointment, and also looked to see if the records contained any clues that the man was at risk. We revealed that he felt threatened by family members -- something of interest to the police since the family had denied any tension.

(2) The police or coroner contacts us after the suspected suicide death of a client, as part of ascertaining the cause of death. They have a legal right to the records in our state as well as in most jurisdictions. We verified their identity and the reasons they are seeking access. (From what Sam Knapp provided, it would appear in Pennsylvania that a psychologist might be expected to ask for a court order. We decided that such a course of action would delay the legal determination, lead to unnecessary expense, and allow for access to the full record. We did not think that it would be the client's wish that his records be made available.

OUR ACTION: We talked them out of records access, trading answers to questions as an option to sending the records. We would rather provide a limited disclosure than end up giving up the records

with all of the things which are in them. Bear in mind that court proceedings do not always protect privacy once records are in evidence, and there is nobody there to argue admissibility -- for example, that the records should be redacted. The court has a right to know that the man was depressed and talking of suicide, but do they need to know that he has always hated his aunt? or that he was gay?

Bear in mind that we have the reports and raw data on the defendants in the Nuremberg trials. The same goes for Sirhan Bishra Sirhan, alleged assassin of Robert Kennedy. We know that on card IV of the Rorschach he saw a "charging monster." Legal actions have often resulted in the disclosure of family secrets unconnected with the purposes for which they are sought.

(3) Someone's heir contacts us wanting access to, or copies of, the deceased client's file. In our state (and most if not all others) they can control access and thus could authorize their own access.

OUR ACTION: We were cordial and attempted to talk them out of access with a variety of arguments. We empathize with them in their grief and offer referrals for support. In most instances our arguments cause them to back off. The arguments have to do with privacy and whether they themselves, were they to have been the client, would not have wanted it.

QUERY: As a remedy for this situation, it would appear that you could have the client sign an advanced directive granting access only to police and coroner investigating a death, or under court order? If you personally are in therapy, would you want your family to be able to read those records if you are in a car accident and go into a coma, or if you suddenly die?

(4) A therapist contacted us for help in sorting out her experience, as a client, with a famous therapist. He had engaged in lots of boundary violations. She had many tape recordings. She wanted to deposit them with us for study since our center does a good deal of work on professional boundaries. Eventually she wanted us to use them in a fashion which might publicize the relationship. We had begun to discuss her thoughts on this, but before we had discussed it fully a large box arrived. She mailed us money to help us handle costs in publishing them in some fashion. I had agreed to look at the materials and decide if I thought anything could be done with them. I had no idea that the records were this voluminous.

She had been quite depressed and in concert with a colleague in the city in which she lived, we helped convince her to go to a facility for some treatment. She left after sending us that box. I attempted to contact her to discuss this further and to indicate that I didn't know if we could carry out her wishes. I learned that she had not gone to the treatment facility but had gone to a hotel, and then disappeared. It turns out that she had walked to a favorite lake and as the sun set she had overdosed while making some diary entries. A snow fell and they found her the next day covered with a layer of snow. She could no longer discuss her wishes with us, but had sent a letter giving us "carte blanche."

ACTION: We have listened to some of the tapes and we have the box. She thought they might have historic value. However, the therapist in question would appear to have some rights in this process, and there are probably a number of people who would be potentially hurt. The famous therapist's spouse is in the field. And to tell the story honestly we would need to examine the fact that she herself had deserted a group of borderline clients -- all of whom had made a "no-suicide" pact. The clinicians who had to "clean this up" were not feeling very charitable. So at present we retain the records and have not settled this dilemma sufficiently to act.

(5) The Martin Orne - Anne Sexton case -- the issue of heirs using substituted judgment. Anne Sexton began her writing career in 1956 after a suicidal episode, and with the encouragement if not the

direction of Dr. Martin Orne -- a psychologist and psychiatrist. Poetry writing was actually a part of her therapy and she even called it her "therapy." In her poems she disclosed many personal details including many aspects of her relationship to Dr. Orne.

In 1974 Ms. Sexton suicided at age 45. Years later biographer Diane Middlebrook approached Ms. Sexton's literary executor, her daughter Linda Gray Sexton, for access to papers and records. Her daughter grants access and this eventually leads to access to the records of Dr. Orne, including more than three hundred of tape-recordings of actual therapy sessions. Dr. Orne went along with the request, and also then chose to provide Middlebrook with hours of interview and his own recollections, and ended up writing the Introduction to the biography of Anne Sexton.

Ms. Sexton had left her daughter with a suicide note containing a poem:

I will go now
without old age or disease
wildly but accurately,
knowing my best route.

But with all of the disclosures, Linda learned, through this material, that her mother had engaged in some incestuous behavior with her -- something she had no independent awareness of. In fact she learned many private things about her mother that she would otherwise not have known. She eventually wrote SEARCHING FOR MERCY STREET (which is where the title of my talk came from) to discuss her own perceptions of her family history. "Mercy Street" is the place where all things are forgiven.

The eventual biography by Diane Middlebrook had some limitations placed on it by Linda in terms of some details about the family. But these are Linda's, not her mother's, and Linda seems to take the position that since her mother was so open about her problems when she was alive she would not want to censor anything now. Dr. Orne also had the ability to review the manuscript.

This case was the subject of a fascinating discussion in May 1992 at the American Psychiatric Assn. convention. There was a panel chaired by Dr. Herb Sacks which included Diane Middlebrook, Maxine Kumin, and Drs. Jay Katz and Ed Pellegrino. Although the release of the records was the main topic, discussion of this case is always colored by the fact that the records revealed that Dr. Orne knew that a therapist in Boston had sexual contact with Ms. Sexton while he was treating her. This was not reported at the time to any regulatory body.

It was noted that confidentiality and privacy -- related to the ethical principle of client Autonomy -- were superseded by demonstrated risk of harm to others. In such situations (e.g. "Duty to Warn or Protect") the ethical principle of Justice trumps Autonomy. But in this case no such exception could be argued. The argument for release of the records was to benefit others.

Freud, who as I noted earlier, had argued that case studies were critical to psychoanalysis, indicated in his analysis of Leonardo Da Vinci, that it had nothing to contribute to our understanding of creativity. Nonetheless, he went on to analyze Leonardo, focusing considerable attention on his dream image of a "vulture" which Freud said explained his creativity. However, it turns out that this was a mis-translation--the actual bird was a kite. The question is, beyond Freud's view, what are we to make of Dr. Orne's argument that others might benefit from the release of this confidential material.

It has also been noted that although Dr. Orne's treatment of Sexton was presented in the book as having been brilliant and having made her into a poet, she had in fact displayed poetic ability as early as

age 18, although Dr. Orne's therapy certainly assisted her in developing her skills. The tapes were made to assist her in recalling information from earlier sessions and Orne's therapy is presented as innovative and heroic at times. However, Dr. Orne actually began his work with Sexton in the first month of his residency. Ironically, his supervision is never mentioned.

Linda Gray Sexton had the legal authority to authorize access. The question is whether Dr. Orne should have resisted this authorization and attempted to protect his deceased client's privacy. Beyond accessing the records, it was he that volunteered that there were all those tapes, and further it was he who agreed to given so many hours of interview. Should he not have resisted records access and not volunteered the rest?

While there is an ethical principle -- Justice -- which relates to the protection of others from harm, there is none that has to do with alleged benefit to other clients or the profession in a generic sense. So, beyond the duty to warn or protect, access to medical records which might help offspring identify genetic problems might be justified under some circumstances. But that was not at stake here.

Ironically, Dr. Orne did not feel that his client's privacy should be over-ridden to report the psychotherapist, Dr. Frederick Duhl, who had sexually exploited her. In this case it would appear that Ms. Sexton opposed such release, and by the standards of the day it would not have been justified. However, some critics consider it interesting that Dr. Orne did not reveal this to regulatory bodies after her death since Dr. Duhl was still practicing.

Finally, the question remains, since it would appear that Ms. Sexton did not consent to the release, whether (1) she could have, and whether (2) Dr. Orne could have provided surrogate judgment after her suicide. A true surrogate decision-maker must: (1) have been appointed (Orne had not been); (2) must know the patient's values (here Dr. Orne would qualify); and (3) cannot have a conflict of interest -- either monetary or emotional (here Dr. Orne fails the test).

What would have been necessary for Ms. Sexton to consent to the release? Given the unfinished stage of her therapy, and the fact that there was no way of knowing whether at its conclusion she would want to remain a "confessional poet," was she in a position to consent? Sharing some things in poetry is not the same thing as releasing records, tapes, and one's therapist to speak with a biographer. Would it depend on which biographer? Would she want, as did her daughter and Dr. Orne, some control over what information was utilized, and how it was presented? Books live forever -- would she want to have this amount of her personal life in print forever. Would she have wanted Linda Gray Sexton to know of the incestuous interlude?

We'll leave this all for future discussion -- perhaps at a future APA convention.

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